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Defending Honor and Beyond: Reconsidering the Relationship between Seemingly Futile Defense and Permissible Harming

*In Helen Frowe's book, *Defensive Killing*, she argues that some cases of seemingly futile self-defense are actually instances of justifiable defense of the victim's honor. This paper explores Frowe's claim, first by isolating the central cases and then by examining her rejection of punitive reasons. From there, the paper examines Frowe's understanding of "defense of honor," ultimately suggesting that Frowe's conception is best construed as action that has expressive, but not defensive, value. From there, I turn to two more general puzzles. First, what if the defender mistakenly believes that she can successfully defend and acts for that reason, but the reason that actually supports her action is not one she is acting in light of? And, second, how ought we to understand the interests of an aggressor who has forfeited his rights?*

Helen Frowe, *Defensive Killing*, self-defense, honor, necessity

**This is the draft that was submitted to the Journal of Moral Philosophy. For copyright reasons, I cannot post the final version, accepted on March 3, 2017. Some corrections and amendments were made to the discussion that follows. For a final version, please refer to the journal.*

Defending Honor and Beyond: Reconsidering the Relationship between Seemingly Futile Defense and Permissible Harming

Kimberly Kessler Ferzan*

There is an intuitive sense that even when, as the Star-Trek villains “The Borg” would say, “Resistance is futile,” defensive force remains permissible. A woman, unable to prevent a rape, does not seem to wrong her attacker by breaking his wrist. The Warsaw ghetto uprising seems honorable, even though the “defenders” knew their resistance was in vain. And, as Danny Statman notes, we cheer for John Wayne cowboy movies where, even when they are surrounded, we think the heroes do right by taking their last stand.¹

Should we conclude that defensive force need not be necessary? This would be too quick. Whereas these futile defenses seem permissible, other acts of unnecessary defense do not. May I shoot a culpable aggressor when I can safely escape? It seems that I would act impermissibly in so doing.

These cases are distinct, despite the fact that in both instances, defensive force is in some sense unnecessary. In the first, the defensive force appears ineffective (and thereby unnecessary because it is not sufficient to stop the attack), whereas, in the second, the defensive force would be sufficient but remains unnecessary to prevent harm to the victim.

In her book, Helen Frowe claims that some acts of ineffective defense are not ineffective after all. Rather, some force may be proportionate to defending the victim’s honor. She is further

* I thank the participants at the Workshop on Helen Frowe’s Defensive Killing and Seth Lazar’s Sparing Civilians as well as the participants at the Harvard Law and Philosophy Colloquium for the probing criticisms and insightful suggestions. Frances Kamm and Alec Walen provided invaluable feedback on this manuscript.

¹ Daniel Statman, ‘On the Success Condition for Legitimate Self-Defense’, *Ethics* 118 (2009), pp. 659-686.

willing to extend this defense of honor to cases of the second type, allowing some harm to attackers even when victims can safely retreat.

In this paper, I begin by setting forth the central case of futile defense and eliminating distracting cases that misunderstand the nature and justification of self-defense. I then consider one justification for harming in futile defense cases that Frowe rejects: punitive reasons. I argue that punitive reasons can justify harming the attacker in futile defense cases and show that Frowe's deferred harming objection to punitive reasons fails. From there, I consider Frowe's claim that some force is justified because the victim is defending her honor. I find this claim to be undertheorized and thus address different conceptions and claims about honor that may be at work.

After suggesting that Frowe's conception of "defending honor" is best construed as action that has expressive, but not defensive, value, I turn to two more general puzzles implicated by these unnecessary defense cases. The first is the problem of mismatch. What if the defender mistakenly believes that she can successfully defend and acts for that reason, but the reason that actually supports her action is not one she is acting in light of? That is, may the defender avail herself of punitive reasons if what she aims to do is defend herself? The second puzzle is how to understand the interests of an aggressor who has forfeited his rights. Frowe seems to believe that these interests may be asserted by the aggressor in a lesser-evils calculation. In contrast, I maintain that aggressors who have forfeited rights cannot assert the interests that were protected by those rights.

I. Futile Defense Cases: The Central Case and Question

Within the category of futile defense cases, it is important to put one class of cases to the side at the outset. As Frowe rightly observes (111) and as was previously noted by David Rodin,² one need not do any fancy footwork to explain why Alice, who is threatened to be raped by five men, may kill three, even though she will still be raped. Rights are relational. Alice gets to prevent Bob from raping her, even if Carl still will. Hence, some of the cases suggested by Statman do not require a resort to defending honor to resolve them.

² David Rodin, 'Justifying Harm', *Ethics* 122 (2011), pp. 74-110, p.92; see also F.M. Kamm, 'Self-Defense, Resistance and Suicide: The Taliban Women', in Helen Frowe and Gerald Lang (eds.), *How We Fight: Ethics in War* (Oxford: Oxford University Press, 2014), pp. 75-86.

Because multiple attacker cases, where force is not futile against specific rights violations, contaminate our intuitions about some instances of unnecessary force, let us focus on one of Frowe's cases (originally imagined by Joanna Mary Firth and Jonathan Quong³) that offers a pure example of futile defense.

Rape: Eric is in the midst of culpably raping Fran. Eric is much bigger and stronger than Fran, and consequently there is nothing she can do to stop him from continuing to rape her. While being raped, Fran threatens to break Eric's wrist, though this will do nothing to stop the rape from occurring. The only way Eric can stop Fran from breaking his wrist is to quickly break her wrist first. (99).

One immediate question is whether Fran believes that her action will stop the attack. I will return to this issue later. For now, let us proceed on Frowe's assumption that Fran knows that breaking Eric's wrist cannot prevent the rape. That is, we begin with the assumption that Fran does not think there is even the slightest chance that she can be successful, and thus, her action is not being done with the intention of defending herself against the sexual assault.

II. Punitive reasons

The question at hand is whether Fran is permitted to break Eric's wrist, particularly given the concern that if she is not so permitted, Eric might have the right to fight back and stop her. I think it is extremely plausible that punitive reasons do exist that support Fran's actions and that Frowe has not successfully ruled such reasons out of consideration.

Frowe considers but dismisses what she calls "punitive reasons," including desert (106) and deterrence (107). "But although punishment is the most obvious candidate for justification for harming Eric, it fails to provide a satisfactory justification for inflicting harm in the cases under discussion." (107).

She finds two objections to punitive reasons accounts to be surmountable. She believes the concern that private individuals can't usually punish is not inherently problematic; after all, the aggressor is liable to the harm, and any punishment received by aggressor at the hands of the

³ Joanna Mary Firth and Jonathan Quong, 'Necessity, Moral Liability, and Defensive Harm', *Law and Philosophy* 31 (2012), pp. 673-701.

defender can be deducted from the state's ultimate imposition of sentence.⁴ (107). Second, one may worry that private citizens will get the wrong guy, but during the rape itself, Fran isn't likely to make a mistake about her attacker. According to Frowe, this too is a surmountable objection. (107).

Frowe's central objection is that punitive reasons don't seem to rule out "deferred harming." Why can't Fran break Eric's wrist the next day? "Liability to punishment is triggered by engaging in wrongdoing, but persists once the wrongdoing has ceased." (107). How can the reason that applies to letting the state be the one to punish attackers "somehow get stronger once the attack has ended[?]" But it's hard to see why this would be the case--unlike defensive action, there's typically no urgency about punitive measures." (108) Given that we would not let her punish him later (we would insist that the state do it), why let her punish him now? It seems like indulging vigilante justice.

Frowe then just concludes: "If we do not think that Murderer and Eric are liable to suffer deferred harm at the hands of their victims, we will need to reject punishment as the source of a liability to non-defensive harm." (109) Either Frowe is rejecting that punitive reasons exist or she is rejecting that they are available to Fran. I find neither claim plausible.

To deny that punitive reasons exist is to reject that punitive reasons are generated during the rape. This can't be true. Consider first desert. Eric, by virtue of his culpable wrongdoing, deserves to be punished. If so, then this reason exists *at the time of the rape*. What about deterrence? The case is both stronger and weaker. Deterrence is empirically contingent and thus the reason may not obtain at all.⁵ The reason will exist when it deters and won't when it doesn't. In that sense the case is weaker. But when the reason does exist, there is no doubt that it exists during the rape itself. Hence, even if you think that "punishment" requires the state, deterring aggression clearly does not.

The fact that these reasons do exist does create the puzzle of deferred harming. So, how might we account for the fact that Fran can't punish Eric later? To my mind, the best account would be one that draws on the state's role (and possible monopoly) on punishment. What Fran does wrong—if she acts wrongfully at all—is to take over the state's role, but her action does not

⁴ It is an open question in criminal law theory whether such a deduction should occur, see Douglas N. Husak, 'Already Punished Enough?' *Philosophical Topics* 18 (1990), pp. 79-99; see also Ferzan, 'Desert and Defense'.

⁵ See also Statman, 'On the Success Condition for Legitimate Self-Defense', pp. 659-686.

violate Eric's rights. Moreover, there is certainly room for a theory of the state that holds that an individual, while being attacked by a wrongdoer and unprotected by the state—is simply not governed by the social contract to leave punishment to the state. After all, at that moment, there is not a functioning state that is holding up its end of the bargain by protecting her.⁶ Indeed, I have argued that the reason why we applaud vigilantes in popular culture where the hero is provoked (my favorite is Russell Crowe's killing of Joaquin Phoenix in *Gladiator*) is because these are cases where not only does the bad guy have a lot of desert long overdue but also the state has wholly failed to give the bad guy what he deserves (in *Gladiator*, the bad guy is the state).⁷ We may thus think that in the absence of a state that protects her *right now*, Fran may be permitted to punish Eric.⁸

We may think that after *Rape*, Fran has rule of law reasons to defer to the state. If she went and broke his wrist the next week, then, it isn't that the desert reason operates less strongly — it doesn't. But the fear that there will be downstream effects that others might retaliate in mistaken situations, combined with a general belief that the state is just, operate to require Fran to stay her hand. That said, if she breaks his wrist, I still think he fully deserves it.

Now, perhaps Frowe's quick conclusion was meant to say not that these reasons do not exist but that they are never available to Fran. Fran is not entitled to punish. Given that Frowe explicitly rejects the argument that "we don't typically allow private individuals to dish out punishment" (107), just two pages prior, such a move is not supported by the text. More importantly, the question of whether Fran wrongs Eric by giving him what he deserves is simply a different question from whether Fran violates the social contract by not ceding authority to the state.

The more difficult question, and one to which I will return in a bit, is what intention Fran must have while harming Eric. That is, a better argument Frowe could make against access to punitive reasons is that an action cannot be considered punitive unless the harm is inflicted with

⁶ I won't pretend that this argument is not a tough row to hoe. But it doesn't strike me as wildly implausible.

⁷ Kimberly Kessler Ferzan, 'Provocateurs', *Criminal Law and Philosophy* 7 (2013), pp. 597-622.

⁸ Alternatively, we might think that at the very least, Fran is excused in violating the social contract because it would be too hard a choice to ask her to decline to punish during the course of the crime. As Frowe noted in conversation, an excuse account would yield that punitive reasons do not *justify* harming Eric, and it is an account of justification that Frowe is seeking. Still, such an account would yield that Fran does not wrong Eric, and thus, Eric does not have the right to counter-defense, which, I take it, is the most significant worry about finding Fran's action unjustifiable.

the intention to punish. There is thus a possibility of a mismatch between Fran's reasons for imposing harm and the reasons that might support it. I will return to this mismatch question in what follows.

III. Defending Honor

A. Frowe's Account

Frowe argues that defending honor is a better explanation for our intuitions that futile defensive actions are permissible. They are not futile after all! Fran is successfully defending her honor. In articulating how this might be so, she endorses Statman's claim that "in the eyes of the aggressor, we are just items to be used, mere objects." (109)⁹ And, she approvingly cites Barbara Herman's formulation that one may defend against an aggressor because he "would use me (take my life) for his purposes." (110)¹⁰

From here Frowe does a bit of synthesis and extrapolation, maintaining this sort of argument only applies to "culpable aggressors" who "demonstrate some inappropriate lack of regard" for the victim. (110). Understanding what is at stake in the attack is essential to determining what sort of response is proportionate. Here, Frowe concurs with Statman's assessment that the attack on honor is correlated with the gravity of the underlying threat:

The gravity of the threat to honour is likely to increase as the seriousness of the primary threat increases because a threat to honour is about the wrongness of thinking that one may do this sort of thing to one's victim. The worse that one is treating one's victim in terms of the primary threat, the more one denies her status as a person deserving of a certain sort of consideration. Thinking that you are the sort of thing that I can slap because I feel like slapping you is not as significant a threat to your honour as thinking that you are the sort of thing I can rape or kill or seriously assault because I feel like raping, killing, or seriously assaulting you. (112).

Frowe concludes that threats to honor are not as bad as the primary threats. Even when the primary threat is rape or killing, she argues, contra Statman, that the corresponding threat to

⁹ Citing Statman, 'On the Success Condition for Legitimate Self-Defense', p. 669.

¹⁰ Barbara Herman, 'Murder and Mayhem' in *The Practice of Moral Judgment* (Cambridge, Mass.: Harvard University Press, 1993), p. 129.

honor only justifies imposition of “moderate harm like a broken wrist or arm.” (112-13).¹¹ More force would not be proportionate, Frowe asserts, because the defensive harm is conveying one’s assertion that one will not be passive and complicit and that one is a person worthy of better treatment. (113). Moreover, defending honor comes with its own success, as it is in the trying that one reasserts one’s dignity. (114).

Frowe is cognizant of the fact that she must offer a limit to defending honor, lest the “deferred harming” objection hoist her on her own petard. She suggests that to the extent that the threat to honor supervenes on the primary harm, then the threat to honor is over when the primary threat is over. (113). The defender might seek *restoration* of honor but she cannot prevent the harm done. (114).

Frowe then considers further extensions of defending honor to instances in which force is unnecessary because lesser means are available to the defender:

Lucky Escape: Murderer is shooting at Victim to try to kill him because he dislikes Victim. He chases Victim to the edge of a cliff. Unbeknownst to Murderer, Victim has both a gun and a parachute. He can thus save his own life by either (a) jumping to safety, using no force against Murderer, or (b) shooting and killing Murderer.

Because Frowe takes necessity to be an external restriction on the use of permissible self-defense, she claims that Murderer is liable to defensive force so he cannot kill the Victim in counter-defense, but Victim still acts impermissibly in shooting him. (117). Hence, according to Frowe, even if culpable aggressors have forfeited their rights, it is still not all-things-considered permissible to kill them unnecessarily. (117).¹²

Despite the fact that Murderer is not liable to being killed, Frowe maintains that “some harm inflicted on Murderer can be necessary as a means of Victim’s defending his honour.” (117) “Since Murderer poses a lethal threat, it will be proportionate for Victim to inflict quite significant harm to defend his honour, and thus a substantial component of the lethal harm Victim inflicts will satisfy the necessity constraint.” (117). Because Murderer is liable to some

¹¹ As noted by Frowe, it seems likely that Statman’s intuitions were tainted by the multiple aggressor cases. It seems plain that one may kill one potential rapist even if another person will rape one. But Statman saw these cases as futile defense cases and thus reached the conclusion that one may kill to protect one’s honor.

¹² Accord Kimberly Kessler Ferzan, ‘Forfeiture and Self-Defense’, in Christian Coons and Michael Weber (eds.), *The Ethics of Self-Defense* (Oxford: Oxford University Press, 2016).

successful harm by Victim's defending his honor, Murderer is entitled to use force only to the extent that Victim's force is disproportionate to the honor defense.

B. Assessing Honor

I am sympathetic to the idea that we may use a mild amount of force to defend our honor and dignity. That said, I find Frowe's account to be problematic and undertheorized in several respects. Admittedly, Frowe's book seeks to accomplish quite a bit in a short number of pages, but before one signs onto the "Hooray for Fran and her honor!" account of our intuitions, let me set forth some cautionary questions and see if we can tease out different notions of honor and defending honor that may be at play.

1. What does it mean to threaten honor?

In *Rape*, there are two distinct factors that inform our view that Fran is defending her honor and Frowe focuses on both of them. One factor is that rape entails using another person as a means. The second is that Eric is culpable.

It does not seem that "using" is necessary to constitute an attack on honor if attacking honor is to be understood as manifesting a disrespectful attitude. Consider a purposeful eliminative killing. What if a woman, jealous that her boyfriend has dumped her for another, shoots her competitor dead in order to be with the man of her dreams? The killing here is clearly eliminative, not opportunistic. She does not want to disrespect this woman; she just wants this other woman to go away. Are eliminative killings threats to honor? Frowe states:

Thinking that you are the sort of thing that I can slap because I feel like slapping you is not as significant a threat to your honour as thinking that you are the sort of thing I can rape or kill or seriously assault because I feel like raping, killing, or seriously assaulting you. (112).

This argument seems to presuppose that the aggressor is harming the victim as a means to some end if only the end of feeling like deriving pleasure from harming the victim. However, Frowe also seems to think that attacks on honor are actions that reveal culpable disregard for others, that is, showing insufficient concern for others' interests. In that case, honor is attacked whenever the victim is intentionally harmed.

From here, it seems that we might be inclined to find that lesser culpability also counts, including recklessness. What if I speed home to catch the most recent episode of my favorite soap opera, thus imposing a risk on you as a pedestrian? If you can't stop me from unintentionally, but recklessly, rendering you quadriplegic, can you break my wrist and say, "You can run me over, but you can't take my honor!"? Are attacks on honor just culpability by another name?¹³

Larry Alexander and I have argued that culpability is manifesting insufficient concern for another's interests.¹⁴ It seems that the idea that Frowe is after here is not opportunistic use but rather the manifestation of an attitude that the victim does not count. It is that disrespect to which the victim is responding.

2. What is the relationship between an attack on honor and the primary harm?

To this point, we might think that the sort of disrespect embodied in an attack need not entail *using* a person and includes culpable attacks on others. One might then wonder whether culpable attacks, even if they don't cause harm themselves, still constitute attacks on honor such that one may harm culpable attempters. Statman suggests that when honor stands alone, it will justify some use of force, just not the use of deadly force that he took to be proportionate when honor was parasitic on a primary harm. An implication of Frowe's claim that one can defend honor in *Lucky Escape* is that honor is itself sufficient for some defensive force. Indeed, at one point, she claims the difference between inchoate and choate crimes is the difference between just insulting your honor and insulting your honor and harming you. But that would mean that if I intend to kill Helen, point a gun at her, and she knows the gun is unloaded (but I do not), she is permitted to harm me to prevent me from pulling the trigger so that she might defend her honor. Do I really succeed in dishonoring her if I fail in my attempt? I reveal that I am culpable and do

¹³ Frances Kamm argues that "mere resistance" is permissible in response to unjust attacks, even when the aggressor is not culpable. Kamm, 'Self-Defense, Resistance and Suicide: The Taliban Women', n. 4 (deluded child with gun is liable to defensive action because attack is unjust and individuals may engage in "mere resistance" against unjust acts). Kamm takes there to be value in responding to wrongdoing. Still, where the aggressor is not culpably manifesting disrespect, it is harder to get a handle on why nonculpable aggressors (such as a child who believes a gun is a toy) may be harmed just for "standing up to unjust acts," in instances where the harm serves neither defensive nor punishment goals. Because responding to Kamm's view, which Frowe does not discuss, would take us too far afield, I will focus only on the view of honor that Frowe appears to be endorsing.

¹⁴ Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009), pp. 23-68.

not respect her but is she truly permitted to break my wrist just to stop me from pulling the trigger of an unloaded gun which will reveal that I disrespect her? As a matter of reporting one's intuitions, I will admit that I find it far less plausible that one is entitled to use force to defend one's honor when one knows that no harm is at issue.

On the other hand, tying honor to the primary harm seems to create the opposite problem which is whether the attack on honor can be thwarted if the primary harm is not. Consider the claim by John Gardner and Stephen Shute that the wrong of rape *just is* the opportunistic use.¹⁵ Admittedly, there is something decidedly odd about disregarding the harms inherent in rape as mere epiphenomena.¹⁶ Still, if the most abhorrent thing about rape is the use of a person as a means and that cannot be stopped, in what sense is honor truly being defended?

3. Honor and expressive value

Maybe we should not think of “defending honor” as being the same sort of action as other sorts of defensive force. That is, rather than thinking that the harming of the aggressor somehow averts a threat to honor in the way that we think physical harms avert physical threats, perhaps defending honor is more expressive than defensive. I think Frowe equivocates a bit on her conception. Frowe does seem to view the conduct as “defending honor,” as she mentions force that is “proportionate to averting the threat to honor” (112) and “defend[ing] herself against a threat to her honour.” (114) These phrases indicate that the conduct will avert the harm. However, other passages point toward a more expressive view:

When we think about what it is that such harms try to convey—a refusal to be passive, a refusal to be complicit, a means of asserting oneself as a person worthy of better treatment—it seems that even in the face of a serious threat to one's honor, such as that present during rape inflicting a moderate harm upon one's attacker (a broken limb, for example) would suffice to manifest such an attitude which is what constitutes the defense of one's honour. (113)

¹⁵ John Gardner and Stephen Shute, ‘The Wrongness of Rape’, in Jeremy Horder, (ed.), *Oxford Essays in Jurisprudence, Fourth Series* (Oxford: Oxford University Press, 2000), pp. 193-217.

¹⁶ See Victor Tadros, ‘The Distinctiveness of Domestic Abuse: A Freedom Based Account’ *Louisiana Law Review* 65 (2005), pp. 989-1014.

In this sense, “fighting back” has intrinsic expressive value. It therefore comes with its own success condition, as merely by fighting back one is (re)asserting one’s worth.

This idea is deeply entrenched. We have a number of norms that take it to be valuable to fight in the face of futility. In the face of the opposing team’s inevitable victory, every parent teaches her child to play the game out. You don’t quit, give up, throw in the towel, but instead, you play your best even in the face of certain defeat. And, we think that this strength of will and determination are valuable character traits. This may be the same ethos that supports thoughts such that one should not “go gentle into that good night.” We see value in the act when you “rage, rage against the dying of the light.”

Part of the rationale for why such “resistance” is valuable may trade on the thought that one ought not to give up or resign oneself to failure. This may in fact color our intuition that Fran may fight back. We might think that she can’t *know* that defensive force will not work. She should still try to stop Eric. It might work! Still, as a parent who has sat through too many children’s sporting events, sometimes one team *knows* they are going to lose and we still see the value in fighting until the end.

In thinking about the value in this “resistance,” we can also gain some insight by looking at its converse—not fighting back. Both Herman and Frowe use the term—*complicit*—to denote one’s role in the injury to oneself if one does not fight back. In some ways, this is a staggering accusation. Someone hurts me and if I don’t fight back, I am part of the problem! I’m hurting myself! This claim is conceptually and normatively unattractive. Conceptually, we tend to think of complicity as requiring purpose (not even knowledge will do) and it is certainly not my aim to be hurt. Normatively, it seems to add insult to injury to say that someone who is being attacked is also *required* to fight against that attack, lest she be dishonoring herself. There are good reasons why the law of rape has moved away from the requirement of resistance to the utmost by the victim to an understanding that women—some of whom suffer frozen fright—are just as violated when they don’t fight back.

Although I think that we should not place a duty on the victim to resist, I think we can still grant significance to the attitude expressed when one does resist. One’s behavior *just is a reassertion of oneself and one’s value*. One is not required to do this, but we might still understand that one is saying this by one’s actions. There is an expressive meaning that is communicated by this act in reasserting one’s value in the face of attack.

This way of thinking about honor raises four questions. First, how does the aggressor become “liable” to this expression of honor? Second, does this conception apply in *Lucky Escape*? Third, how does it relate to necessity? Fourth, how does it survive the deferred harming objection?

4. Liability and expressing honor

In some ways it seems obvious that one who fights back expresses or defends one’s honor against one’s attacker. I don’t doubt that this is true. At this point, I wish only to express the concern that we may need to avail ourselves of additional explanatory resources to articulate why it is that Fran gets to harm Eric as a way of saying, “I respect myself and you ought to respect me.” Although I will turn to the necessity question momentarily, for now, the question on the table is simply why it is that the attacker must absorb a harm, a harm which is expressing something. That is, we are asking whether Eric has forfeited a right against this sort of harming where the justification for the harming is grounded neither in desert nor defense.

It may be that we get to say that when one violates another’s rights and does so culpably, thereby manifesting disrespect, one cannot complain when the rejection of that message is accomplished by force in reply. The alternative would be to say that actors do not forfeit rights against expressions of honor. Rather, like deterrence, expressive reasons can only serve to justify harms that the agent does not have a right against. Just as we may offer a deterrence justification for punishing culpable actors, but not innocent ones, because the former have forfeited rights that the latter have not, perhaps we may further expressive values when the actor already has forfeited rights on other grounds.

5. Lucky Escape and the embedded alternative conception of honor

Lucky Escape raises a question that has often debated in criminal law theory and self-defense, and this is the duty to retreat. Retreat has long been understood to be part of the necessity calculation. Indeed, Larry Alexander has noted that criminal codes that do not require retreat but do require that defenders use force only when necessary are internally inconsistent.¹⁷

¹⁷ Larry Alexander, ‘A Unified Excuse of Preemptive Self-Protection’, *Notre Dame Law Review* 74 (1999), pp. 1475-1505.

The right to stand one's ground, and not surrender a position that she lawfully holds, exists and may be protected. But it must be protected proportionately. If the defender knows that she can kill the aggressor to prevent herself from being killed or that she can step on the aggressor's instep to prevent herself from being killed but the latter increases the probability that she will break a heel, then the defender may not kill because one cannot kill someone to protect a shoe.¹⁸ Similarly, we might grant that there is an autonomy interest at work in *Lucky Escape*—and thus in some sense an “honor” interest—allows the use of some force. Asking someone to jump off a cliff—even with a parachute—is a lot to ask! And even if Victim could simply hide behind a bush, you are asking him to yield a spot he lawfully occupies because another has threatened him.¹⁹

The intersection of retreat and honor is contentious. I want to be clear that the way that honor is initially employed by Statman, and the way that it intersects *Rape*, is different than the way that honor is implicated in retreat cases. In retreat cases, the question is whether Victim must run away²⁰ or whether he may stay and fight. This second sense of honor shifts our discussion from the fierceness of Fran, our resilient rape victim, to the thought of testosterone-filled, chest-beating contorted conceptions of masculinity. That said, it seems the distinction that many jurisdictions in the United States adopt is the correct one. One may use nondeadly force without retreating but may not use deadly force. The idea behind not requiring retreat in nondeadly situations is that retreating allows aggressors to violate our rights by forcing us by their wrongdoing to surrender where we may otherwise rightfully be and that retreating encourages further aggression. We need not be indignant about our dignity to see these as appropriate concerns.

This notion of defending honor—as defending one's right to remain where one lawfully stands—exists independently of the notion that the Murderer is dishonoring the Victim by attacking him. Here, Victim is clearly defending his rightful space, and this is an interest that is

¹⁸ See Seth Lazar, 'Necessity in Self-Defense and War,' *Philosophy & Public Affairs* 40 (2012), pp. 3-44.

¹⁹ Quong has argued that to use someone's space is to use him as a means. Jonathan Quong, 'Killing in Self-Defense,' *Ethics* 119 (2009), pp. 507-537. I criticize this position in Kimberly Kessler Ferzan, 'Self-Defense, Permissions, and the Means Principle: A Reply to Quong,' *Ohio Journal of Criminal Law* 8 (2011), pp. 503-513.

²⁰ I highly recommend that you think of the minstrels in *Monty Python's The Holy Grail* singing “Sir Robin ran away, away...”

properly taken into account in what Victim may defend in *Lucky Escape*.²¹ In contrast, I suspect that the expressive value in “not giving up” in the face of defeat has no purchase in *Lucky Escape*. To be sure, we have intuitions that the Victim is standing his ground in *Lucky Escape*, but it seems that the value of expression in the face of certain loss simply does not obtain when the Victim will lose nothing (or what little he will lose is better explained by a different conception). There seems to be less poetic expression in shooting Murderer needlessly. One might think that it is, well, dishonorable. It does not seem that even a wrist breaking is in order. Hence, we might think that either (1) Murderer simply is not liable to any harm beyond what Victim needs to stand his ground and/or (2) harming in this situation fails to express one’s honor.

6. Honor and necessity

Another problem for any notion of honor is whether it actually solves the necessity problem or simply relocates it. Has Frowe, to use one of her favorite locutions, simply moved the bump in the carpet? I think it depends on whether we have our finger on the correct framing of what the defender is doing. To the extent that this is about defending honor as one would defend against a physical threat, it does not seem that the case has been made that harm is necessary. That is, if injuring Eric is sufficient to defend dignity, we might still wonder if it is necessary. Fran could say, “You are raping me. I am not just a means to your end.” She could sing a few bars of Whitney Houston’s *The Greatest Love of All*, “No matter what they take from me. They can’t take away from dignity.” If she really wanted Eric to suffer, she might voice activate her iPhone to play Mel Gibson in *Braveheart* shouting that “They can take our lives. But they can’t take our freedom.” Why would physical harm be necessary to reassert herself as an end in herself? Hence, even if Eric is liable to moderate harm as a matter of proportionality, the necessity problem simply reasserts itself at the level of honor.

On the other hand, if fighting back is valuable because of the meaning of a tenacious fight, then perhaps only some actions will do.²² Because blowing a raspberry just lacks the same expressive function as breaking a wrist, we resolve the necessity quandary because the action

²¹ Cf. Heidi M. Hurd, ‘Stand Your Ground’, in Michael Weber and Christian Coons, (eds.), *The Ethics of Self-Defense* (Oxford: Oxford University Press, forthcoming) (arguing that one need never retreat).

²² I thank Gideon Rosen for helpful discussion.

reasserts honor as an end in itself, such that more assertion just is more meaning just is more honor. The necessity objection may then dissolve.

7. Deferred harming reprised

Finally, let us consider deferred harming.²³ Even assuming we are talking about otherwise futile defense cases, and even assuming that violence does assist in allowing the victim to assert her honor, we must ask whether this conception rules out deferred harming. After all, we have shifted from a notion of *averting a threat* to a notion of *expressing one's honor*. But why does that communication have to be contemporaneous with the attack? In the television show, *The Newsroom*, a woman's ex-boyfriend posts revenge porn on the internet. After he does this and she is humiliated, she goes to his office, knees him in the groin, and punches him in the face. Why would this action assert her honor if it is done while he is pushing send, but not thereafter? Once the value is in the expression—and not in the prevention of dishonoring—the requirement that the expression be contemporaneous seems ad hoc.

For the very reasons I suggested with respect to punitive reasons, I think that we should simply embrace the thought that these reasons do remain in force even after the attack is over. The fact that victims are required to stay their hands is simply a result of a political morality that requires victims to yield to the state. In the absence of the state, do we really think that Fran fails to express her honor if she breaks Eric's wrist the next week? I doubt it.

8. Is Rape special?

One final question we should ask is whether *Rape*, which involves *rape*, contaminates our intuitions. Maybe, outside of *Rape*, where there is a poignant physical struggle, a struggle that so clearly borders on being defensive, we may simply reject that there is any expressive value.²⁴ To test this, we need a case where the defender is not involved in a physical, quasi-defensive struggle.

²³ I thank Victor Tadros for suggesting that this problem has not been solved by Frowe.

²⁴ I owe this objection to Victor Tadros.

Poison. Kelly has surreptitiously given Victoria a slow acting poison. As the poison begins to take effect, Kelly announces this to Victoria. Victoria can break Kelly's wrist before she dies.

Poison should present a strong challenge to both punitive reasons and honor expression. Victoria is done for. Nothing she can do will stop it from being the case that Kelly has killed her. Do we still think that Victoria may break Kelly's wrist?

For those who adopt punitive reasons, it seems Victoria may. After all, harming Kelly may have deterrence value. And, Kelly deserves punishment. (If you imagine that otherwise Kelly will not be caught and will otherwise get away with murder, I suspect retributive intuitions become even stronger, indicating that it is the role of the state, and the possibility of punishment, that dampens intuitions here.)

Imagine that as Victoria is dying, Kelly is taunting her, explaining how she planned the murder, how she will marry Victoria's boyfriend, and so forth. Given that Eric is manifesting substantial disrespect in raping Fran, we will need to embellish our case to approximate the culpable disrespect involved here. Although I suspect that it is hard to distinguish expressive value that could be seen as punishment that vindicates the value of the victim from simply an assertion of the value of the victim, still, the permissibility of Victoria's reassertion of her value in the face of her inevitable death at Kelly's hands seems plausible to me. That is, I do not take *Rape* to present an exceptional case. Nevertheless, to retributivists who think that people who culpable harm others deserve punishment, it is perhaps difficult which reason does the intuitive work. (And to the extent that honor may only be defended when the aggressor is culpable, it is impossible to isolate the reasons.)

Where are we? The claim that one's use of force in futile defense cases constitutes a defense of honor is an easy argument to make. However, to examine honor carefully, we must assess the different strands to see how they connect. What attacks honor? Is honor defended or asserted? Why is the aggressor liable? Why is force necessary? May the harming be deferred?

I do not expect that my brief survey of these questions has yielded definitive answers. I do hope, however, to have advanced the inquiry such that when a theorist argues that defending honor is a solution to the futile defense problem, the theorist will take pains to explain exactly and precisely how honor is defended. I want to turn, however, to another puzzle that lurks

beneath the surface of the honor defense, and this is the relationship between liability, intention, and reasons.

IV. Reasons, Reasons, Everywhere...But What Is Fran Thinking????

At this point, we should recognize that myriad reasons may justify Fran's conduct. Harming Eric may be justified as a matter of desert, as a matter of deterrence, and as a matter of expressing her moral worth. And, perhaps all three of these reasons extend temporally beyond the rape itself. Similarly, in *Lucky Escape* some harm is due and owing to Murderer as a matter of desert, deterrence, defense of honor in standing one's ground, and perhaps defense of honor in other senses. I want to suggest the way that we should put these pieces together, a way that would be congenial to Frowe's positions and would offer a new challenge to punitive reasons.

Let's consider Eric. Is Eric liable to defensive force? Frowe and I would both answer affirmatively though I would say that Eric is only liable to force that Fran believes is defensively required (this will matter for *Lucky Escape* later). Let's assume Fran intends to defend herself. But her breaking his wrist is futile. How should we understand this case?

I think the appropriate analysis of the situation is that Eric is liable but that the harm can't be all-things-considered permissible unless it is supported by reasons. Although I cannot argue for the position here, I take reasons to be fact-relative. Mistakes are not reasons, even when reasonably held. Because I am not inclined to go evidence-relative about necessity, I would say there is no defensive reason here. An omniscient actor would say there is no *defensive* reason for Fran to act.

But enter Frowe's expression of honor. To the extent that the harming has intrinsic value, and Eric is not wronged recall, that harming is supported by reasons.

What about punitive reasons? Well, Frowe is going to have to concede that defenders deter aggression by fighting back. Whether this one does will depend on the actual facts. (Eric is already liable to harm on Frowe's account. The question is whether there are reasons to give him the harm to which he is liable.)

When we reach retributive reasons, I think we have a problem. Are these reasons available to Fran? Ordinarily, we don't think that one is punishing if one does not act with a punitive intention. Assume that Albert and Bob dislike Carl and decide they would like to beat him up. Unbeknownst to them, Carl is a rapist who has not been caught and punished. When

Albert and Bob beat up Carl, unaware of the desert-based reason that obtains, are they punishing him?²⁵

Notably, Fran has a good intention unlike Albert and Bob, but it is still odd to think that this counts as punishment. Unlike the deferred harming objection, then, this one might have teeth.

Let me explain. Eric has forfeited rights against being injured defensively. I suspect that Fran believes she is acting defensively. Eric cannot complain about these injuries because he forfeited rights against them. However, just because an action will not wrong someone does not mean that it is necessarily permissible. If, all things considered, there are not *actual* reasons that support Fran's actions, then she should not harm him.

Think of it this way. Assume that Eric was pointing an unloaded gun at Fran, but Fran thought it was loaded. Fran might not wrong Eric by shooting him, but objectively, she kills someone she did not need to kill. The same question would then arise. If she doesn't need to kill him defensively, are there still reasons that support (perhaps only partially) Fran's harming Eric?

In either case, Fran could try to point to deterrence, desert, or maybe expressive value. But then, what if she isn't thinking of those reasons? Surely, deterrence still goes through because injuring Eric counts as deterrence if it deters, not depending on what Fran thinks. But does desert work the same way? Returning to the wrist breaking, can Fran's conduct be supported by the fact that Eric deserves (more than) a broken wrist if Fran isn't thinking, "You deserve this scumbag!" and is instead thinking, "Get the XXX off of me!"? We might be tempted to think yes, but this is a bit of moral slippage, in taking one justifying reason that usually requires that that justification be the intended (or known) goal and substituting it for the actual motivating reason which would have been justifying had the facts been as the actor believed them.

Of course, this question extends beyond punishment. We might likewise ask whether expressing honor likewise requires an intention. Culpability doesn't – the aggressor manifests disrespect without needing to intend to manifest disrespect. But we do need to be clearer about exactly what expressing honor, because some conceptions might make this reason unavailable to Fran unless she acts with the express intention.

²⁵ Cf. Christopher Heath Wellman, 'The Rights Forfeiture Theory of Punishment', *Ethics* 122 (2012), pp. 371-393.

To summarize the worry, then, *Rape* looks like a case where Fran intends to act defensively, but she's mistaken. Theorists are quick to offer alternative accounts of the deep-seated intuition that Fran may act despite the fact that defensive force is futile. They offer other reasons, reasons that do obtain, to justify the harm. My concern is that not all of these reasons are reasons that have force merely by existing. Rather, sometimes these reasons need to be intended or known before they are available. This may mean that the quest to justify Fran's conduct is somewhat more complicated than it first appears.²⁶

V. Counter-Defense

My final question is whether we should be on board with Frowe's approach to *Lucky Escape*. Frowe takes a somewhat peculiar path in *Lucky Escape* that ought to be more carefully parsed. One result that Frowe thinks we ought to reach is that Murderer cannot kill Victim in *Lucky Escape*. However, Frowe does think that Murderer can fight back against disproportionate force. I believe that this conclusion is incorrect on the terms of Frowe's own argument. Moreover, I worry that Frowe's cabining of her inquiry (ignoring other resources that might explain some of these situations) blocks from view a better explanation of the moral landscape.

Frowe argues that Murderer is liable in *Lucky Escape*, arguing for what she calls "externalism" about necessity. Though I agree with Frowe that the necessity limitation is not best seen as an internal limit on liability, I wonder whether the internalism/externalism debate is the most perspicuous way to see this. Ultimately, the question is whether liability requires not just forfeiture but a reason (understood objectively) for engaging in the conduct. The relationship between liability and reasons is underexamined. One could thereby contrast Tadros' duty approach, where one has an *obligation* to engage in the action, with McMahan's approach, where one must have an instrumental defensive reason, with my approach that liability ought to include only forfeiture.²⁷ On my view, once there is forfeiture, then, the question is how the fact

²⁶ One final complication is that many self-defense theorists (myself included) believe that actors are only liable to those who act defensively, intending or knowing they are so doing. But then the requirements for *liability* seem to hold that the actor is only liable to defensive force, not force that is justified by other reasons. For a fuller explanation, see Kimberly Kessler Ferzan, 'Defensive Force without Defensive Reason', (manuscript on file with author).

²⁷ Compare Victor Tadros, 'Duty and Liability', *Utilitas* 24 (2012), pp. 259-277 (defining liability broadly to include duties that are not grounded in moral responsibility) with Jeff McMahan, 'Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros', *Utilitas* 24 (2012), pp. 278-299 (arguing that liability should be limited to

that the defender's conduct will not constitute a rights violation links to the determination of all-things-considered permissibility. Necessity then serves as a limit to the extent that we think that the *interests* of culpable aggressors remain, even if their rights not to be harmed do not. Frowe's "proportionate means externalism" is thus better expressed as a claim about rights forfeiture (liability) and a recognition that harming, and the extent of harming, must be supported by reasons ("proportionate means").

With *Lucky Escape*, killing Murderer is not supported by reasons. Although I share Frowe's "externalism," I part company with Frowe in thinking that internalists lack the resources to explain why Murderer cannot fight back. As I've argued previously, individuals who start fights may lose defensive rights despite the fact that the responder still wrongs the provocateur by injuring him.²⁸ We can maintain that Murderer started it and so cannot defend while simultaneously judging Victim's actions to be impermissible. Given that this is the widespread position across states and therefore arguably represents the considered judgment of a large populace, it strikes me that philosophers would be wise to devote at least a paragraph to considering whether there is any wisdom to the approach.

Irrespective of whether Frowe finds the provocateur explanation to be plausible, there remains the problem that Frowe's analysis fails on its own terms. She maintains that Murderer is liable to be killed, but such a killing is not all-things-considered permissible. But to Frowe that is not the end of the matter because Murderer is liable to some force as a matter of Victim defending his honor. So, some harming is permissible, and the Murderer cannot defend against that. But what if Victim goes overboard and uses more force than is justified to defend his honor? Frowe then maintains that Murderer can defend himself. "He may therefore use force to defend himself only against the excess harm that exceeds what victim may inflict in defending his honour." (118). Murderer therefore has a "limited right of counter-defence." (118).

I find this result curious. The root of the trouble, I think, is that using internalism and externalism obscures the relationship between liability and reasons.

Consider an examples of the relationship between rights and reasons. My neighbor wants to access the street behind my house by walking on my grass. Begrudgingly, I consent. Now, if

forfeiture so as not to conflate different moral notions). See also Jeff McMahan, 'The Limits of Self-Defense', in Michael Weber and Christian Coons, (eds.), *The Ethics of Self-Defense* (Oxford: Oxford University Press, forthcoming) (arguing liability is instrumental).

²⁸ Ferzan, 'Provocateurs'.

my neighbor has another way to access the street that does not trample my grass, then that is the way that he ought to go. But am I entitled to push him off my grass to enforce this lesser-evil? Or having waived my right am I prevented from any further enforcement of the very same interest at stake? The question is what to make of an interest that is not protected by a right when harming that interest is still all-things-considered impermissible.²⁹

The Murderer's interest is not protected by a right. He gave it up by attacking. On Frowe's view, Murderer is liable to deadly force. The reason why deadly force may not be used is because although the Murderer is liable, it is not all-things-considered permissible and this is because reasons only support using force that is necessary. But the question is whether interests that are not protected by rights – because those rights have been forfeited or waived—may be asserted as interests by the very agents who forfeited or waived their interests. I would think that a comprehensive view of what it means to forfeit or waive a right includes the inability to assert the interest that was protected by that right.³⁰ My allowance of my neighbor's walking across my grass prevents me from stopping him or complaining about the harm to my interests *even if all-things-considered* he ought not to walk across my grass. It is then an interesting question (and one I cannot pursue) whether third parties may intervene to prevent harm to such interests.

Because I adopt intention internalism, that is I require the defender to believe her action is necessary to defend against the harm irrespective of whether it is, I would deny that Murderer is liable to deadly force because I find it hard to believe that Victim himself believes that his action is defensive. Instead, the question for me would then be whether Murderer provoked the use of deadly force such that he forfeits his defensive rights. On my view, Murderer is *wronged* by Victim's use of unnecessary force but cannot defend against it. On Frowe's view, Murderer is not *wronged* by Victim's use of unnecessary force but may nevertheless defend against it on lesser evils principles. Even if she chooses to reject a provocateur principle, Frowe's view that Murderer is liable should require that Murderer stay his hand, even if the force is ultimately impermissible.

The necessity limitation stands at the crossroads of forfeiture and all-things-considered permissibility. We must know its role in determining whether the aggressor has forfeited and its

²⁹ I thank Adil Haque for general discussion of this question.

³⁰ Hence, the idea that consent is in some sense the waiver of one's right of complaint.

role in supporting reasons to use force against those who have forfeited or waived their rights. Our quest to find reasons that might support Fran's use of force is only the first step in a larger inquiry.